Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

ROBERT H. BARRETT,
Petitioner,

v.

BOROUGH OF CARLISLE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

Robert H. Barrett
Petitioner, *pro se*
136 East High Street
Carlisle, Pennsylvania 17013
(703) 524-5949 or (717) 243-0989

44 pp

QUESTIONS PRESENTED

1. Whether property owners were deprived of rights to due process in alleged proceedings before the historic certification authority, in violation of 42 U.S.C. § 1983?

2. Whether property owners were deprived of rights to just compensation for the regulation of their property, absent Constitutionally valid historic certification, in violation of 42 U.S.C. § 1983?

3. Whether Petitioner established excusable neglect or good cause for extending the time for filing a notice of appeal under 28 U. S.C. § 2107(c)?

4. Whether the Appellate Court has jurisdiction to hear the appeal?

PARTIES TO PROCEEDING

In addition to the parties named in the caption, Petitioner filed a joinder motion in the United States District Court for the Middle District of Pennsylvania to join the Pennsylvania Historical and Museum Commission (a state agency) as a defendant in the case. The District Court dismissed the appeal without ruling on Petitioner's joinder motion.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 2

JURISDICTION 3

CONSTITUTIONAL AND STATUTORY PROVISIONS 4

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 8

I. Pennsylvania State Courts falsely read the decision of the United States Supreme Court in Penn Central Tran sportation Company v. New York City, 438 U.S. 104 (1978) to deny that historic certification constitutes a Fifth Amendment "taking" when property owners are denied procedural and substantive due process of law before the certifying authority in historic certification proceedings. 8

II. Pennsylvania State Courts denied judicial review of historic certification proceedings, including final historic certification. 11

II. The District Court abused its discretion in denying Petitioner's motion to extend the time for filing an appeal. The Appellate Court erred in tolling the time for appeal and dismissing the appeal for want

of appellate jurisdiction.. 12

CONCLUSION..... 17

APPENDIX

A. OPINION AND JUDGMENT dismissing appeal by the Federal Third Circuit at No. 00-3074, dated September 11, 2000..... A1

B. SECOND ORDER denying extension of time by the Federal District Court at No. 4:CV-98-1109, dated December 23, 1999 ..... B1

C. FIRST ORDER denying extension of time by the Federal District Court at No. 4:CV-98-1109, dated October 14, 1999..... C1

D. ORDER dismissing complaint, by the Federal District Court at No. 4:CV-98-1109, dated July 21, 1999 ..... D1

E. PLAINTIFF'S OBJECTIONS TO REPORT AND RECOMMENDATION, in the Federal District Court at No. 4:CV-98-1109, dated November 16, 1998..... E1

F. REPORT AND RECOMMENDATION of Magistrate Judge, in the Federal District Court at No. 4:CV-98-1109, dated November 5 1998..... F1

G. COMPLAINT in Federal District Court at No. 4:CV-98-1109, dated November 5 1998..... G1

H. OPINION AND ORDER OF COURT dismissing local agency law appeal in the Court of Common Pleas of Cumberland County, Pennsylvania at No. 96-2446 Civil Term, dated May 5, 1997..... H1

I. Constitutional and Statutory Provisions Involved in the Case..... I1

TABLE OF AUTHORITIES

Cases **Page**

Gains v. City of Tiburon, 447 U.S. 255 (1980) 12

Penn Central Transportation Company v. New York City,
438 U.S. 104 (1978) 6, 8, 9, 10, H12

Statutes

United States Constitution, Fourth Amendment 7, 14, B3

United States Constitution, Fifth Amendment
..... 6, 8, 9, 10, 11, 12, E2, E3

United States Constitution, Fourteenth Amendment
..... 5, 6, 11, 12, F4, G1, G4, H12

28 U.S.C. §1254(1) 3

28 U.S.C. §2107(c) ..... i, 2, 13, B1, C2

42 U.S.C. §1983 ..... i, 5, F1, F4, F6

Rules

Federal Rules of Appellate Procedure 4(a)(6) 13

PETITION FOR WRIT OF CERTIORARI

Petitioner, Robert H. Barrett, a *pro se* litigant, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this matter on September 11, 2000, which said judgment dismissed Petitioner's appeal for want of appellate jurisdiction.

OPINIONS BELOW

Four (4) opinions were rendered in this case, one (1) by the United States Court of Appeals for the Third Circuit (herein, "the Appellate Court") and three (3) by the United States District Court for the Middle District of Pennsylvania (herein, "the District Court"). The opinion and judgment of the Appellate Court addressed only the time of filing and the Court's jurisdiction (reprinted as Appendix A). The opinions of the District Court addressed (1) Petitioner's motions to extend the time for filing a notice of appeal for reasons of excusable neglect or good cause under 28 U.S.C. §2107(c) (reprinted as Appendices B and C) and (2) F.R.Civ.P. Rule 12 motions to dismiss the complaint (reprinted as Appendices D, E, and F). Neither the Appellate Court nor the District Court reached the merits of the complaint (reprinted as Appendix G).

JURISDICTION

Petitioner's civil complaint filed July 09, 1998 was dismissed by the United States District Court for the Middle District of Pennsylvania on July 21, 1999 based on F.R.Civ.P. Rule 12 motions. The District Court denied Petitioner's second motion to extend the time for filing an appeal on December 23, 1999. On January 14, 2000, Petitioner filed an appeal to the United States Court of Appeals for the Third Circuit which denied the appeal for want of appellate jurisdiction on September 11, 2000. The United States Supreme Court has jurisdiction in this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following constitutional and statutory provisions, which are set out in Appendix I:

1. The Fourth Amendment to the United States Constitution.

2. The Fifth Amendment to the United States Constitution.

3. The Fourteenth Amendment to the United States Constitution.

4. 28 U.S.C. § 2107(c)

5. 42 U.S.C. § 1983

STATEMENT OF THE CASE

This is the first of five (5) related cases working through State and Federal Courts to the United States Supreme Court for writ of certiorari. These cases involve the deprivation of rights to due process of law and just compensation, secured by the Fifth and Fourteenth Amendments to the United States Constitution, under color of state law, in violation of 42 U.S.C. § 1983. These violations arose during alleged historic certification proceedings for a local historic district, conducted by the State historic certifying authority. The violations continued through subsequent local regulation of property within the historic district, including denial of building and demolition permits and the regulation of the simple appearance of property.

Petitioner filed this 42 U.S.C. §1983 civil complaint against the Borough of Carlisle for regulating property within the Carlisle Historic District in the absence of valid historic certification. Petitioner avers that the local historic district was never properly certified as required by State law because the certifying authority, the Pennsylvania Historical and Museum Commission, denied property owners procedural and substantive due process of law during alleged certification proceedings. Petitioner avers that regulation of

property within an historic district, absent valid historic certification, constitutes a taking under the Fifth and Fourteenth Amendments to the United States Constitution.

The District Court dismissed Petitioner's complaint based on alleged *res judicata* of the issue in State Courts. Petitioner avers that the State Courts denied judicial review of the historic certification and dismissed his appeal based on a false reading of the decision of the United States Supreme Court in Penn Central Transportation Company v. New York City, 438 U.S. 104 (1978). The State Courts falsely read Penn Central to mean that historic designation is **never** a Fifth Amendment taking, even when property owners were denied procedural and substantive due process of law in historic certification proceedings. Under this interpretation of Penn Central, the State Commission may certify, and local government may regulate, any property under the guise of historic preservation without notification of the property owner or other rights of due process.

In the immediate case, Petitioner twice filed motions with the District Court to extend the time for filing an appeal. In both instances the District Court denied Petitioner's motions, holding that Petitioner's imprisonment in county prison did not constitute excusable neglect or good cause for not having received notices of the Court's orders and subsequent failure to timely file an appeal. Petitioner was

imprisoned for civil contempt of court in a related State equity case for refusing to allow warrantless searches of his properties and papers under discovery proceedings, which violated his Fourth Amendment rights. The State case, including the warrantless searches, is under appeal to the Pennsylvania Supreme Court.

During Petitioner's two (2) periods of imprisonment (one for forty-one [41] days and a second for forty [40] days), Petitioner was unable to communicate with the District Court due to the conditions of imprisonment, and first received notice of the District Court's decisions after his release from prison. In the first instance, Petitioner was released twenty-seven (27) days after the District Court's final judgment dismissing the case, with only three (3) days of the appeal period remaining. In the second instance, Petitioner was released thirty-nine (39) days after the District Court denied Petitioner's first motion to extend the period for filing an appeal, and after the expiration of the thirty (30) day period for appealing the denial order.

The Appellate Court denied Petitioner's subsequent appeal for want of jurisdiction as untimely filed without considering either the merits of Petitioner's historic district claims or Petitioner's imprisonment as excusable neglect or good cause for extending the period for filing an appeal.

REASONS FOR GRANTING THE WRIT

I. **Pennsylvania State Courts falsely read the decision of the United States Supreme Court in Penn Central Transportation Company v. New York City, 438 U.S. 104 (1978) to deny that historic certification constitutes a Fifth Amendment "taking" when property owners are denied procedural and substantive due process of law before the certifying authority in historic certification proceedings.** (See H11-H12.)

In Penn Central the property owners were the Penn Central Transportation Co., et al., and the property at issue was Grand Central Terminal in New York City. In Penn Central, the United States Supreme Court held:

> "On this record, we conclude that the application of New York City's Landmarks Law has not effected a 'taking' of appellants' property. The restrictions imposed are substantially related to the promotion of the general welfare, and not only permit reasonable beneficial use of the landmark site, but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties."

Pennsylvania State Courts have ignored the case

specific conditions inherent in this decision and mistakenly concluded that historic certification is never a Fifth Amendment "taking. Pennsylvania State Courts subsequently concluded that property owners do not have a right (1) to procedural and substantive due process of law before the certifying authority during historic certification proceedings, and (2) to subsequent judicial review of historic certification.

The Pennsylvania State Courts ignored essential conditions of Penn Central. In Penn Central:

(1) Property owners were afforded due process of law because they were notified in advance that the New York City Landmarks Preservation Commission proposed to certify Grand Central Terminal as a landmark site and were provided an opportunity to review and challenge the criteria and evidence supporting such certification.

(2) Although the owners opposed the certification before the New York City Landmarks Preservation Commission, they did not seek judicial review of the final certification. The owners thereby let stand the assumption that sufficient evidence existed to support the landmark certification.

In contrast, the Pennsylvania State Courts improperly denied that historic certification and regulation of the Carlisle Historic District constituted a Fifth Amendment "taking,"

even though property owners were denied procedural and substantive due process of law during historic certification proceedings before the State certifying authority.

In fact, a complete and accurate reading of Penn Central establishes that historic certification must be based on a Constitutionally valid certification process which (1) affords property owners due process of law before the certifying authority and (2) establishes a valid historicical or architectural basis for certification. Only after the property owner has been afforded due process before the certifying authority, can property be certified as historic. Penn Central establishes that a Fifth Amendment "taking" does not occur when property is first certified as historic based on a constitutionally valid historic certification process which afforded property owners due process of law. But Penn Central does not eliminate the requirement that historic certification proceedings be conducted which afford property owners procedural and substantive due process of law before the certifying authority.

Where property owners are denied substantive and procedural due process of law in historic certification proceedings, the conclusions of those proceedings are Constitutionally defective and cannot serve as a basis for regulating property and the loss of property rights. Absent the opportunity for property owners to review historic

certification criteria, to review evidence supporting the historical or architectural importance of proposed property, and to challenge historic certification, the historic certification process violates the substantive and procedural due process protections of the Fifth and Fourteenth Amendments and constitutes an unconstitutional, regulatory "taking" of property rights.

II. **Pennsylvania State Courts denied judicial review of historic certification proceedings, including final historic certification.**

Pennsylvania State Courts refused to review the historic certification of the Carlisle Historic District, and the subsequent "taking" of property rights through property regulation. Ignoring the fact that property owners where denied due process of law and never notified of the certification proceedings or final historic certification, Pennsylvania State Courts claimed that the time for reviewing the historic certification was within thirty (30) days of the certification. (See H10-H11.)

It is a well-settled matter of law that a statute of limitations cannot begin to run until the claim itself accrues. A cause of action does not accrue until a wrongful act causes injury to the party. The United States Supreme Court has repeatedly held, as it did in 1980, that a Fifth Amendment

claim for just compensation is not "ripe," and therefore cannot be adjudicated, until a regulation has been specifically applied to the property and has caused specific harm, Gains v. City of Tiburon, 447 U.S. 255 (1980). In the present case, the claims under the due process and "takings" protections of the Fifth Amendment did not become "ripe" until the Borough of Carlisle refused to issue Petitioner permits based on Historic District regulations.

In denying judicial review of the historic certification, Pennsylvania State Courts improperly denied Petitioner's right of due process of law under the Fifth and Fourteenth Amendments to the United States Constitution.

III. **The District Court abused its discretion in denying Petitioner's motion to extend the time for filing an appeal. The Appellate Court erred in dismissing the appeal for want of appellate jurisdiction.**

The District Court issued its final judgment in this case on July 21, 1999. On that date Petitioner was in county prison for refusing to allow warrantless searches of his properties under discovery proceedings in a related state equity case. While imprisoned, Petitioner, a *pro se* litigant, was unable to communicate with the District Court and was not aware of the District Court's final judgment. On August 17, 1999, twenty-seven (27) days after the District Court

issued its final judgment, Petitioner was released and first learned of the District Court decision. Under FRAP 4(a)(6), the district court may reopen the time to file an appeal if the court finds that the moving party was entitled to notice of the entry of the judgment sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry. In fact, Petitioner did not receive the notice from the District Court until after his release from prison on August 17, 1999.

On September 07, 1999, twenty-one (21) days after learning of the District Court's final judgment and forty-eight (48) days after the District Court's final judgment, Petitioner filed a motion to extend the period for filing an appeal. In fact, Petitioner filed his motion within thirty (30) days after the expiration of the time otherwise set for bringing an appeal as allowed under 28 U.S.C. §2107(c).

Petitioner argued that his *pro se* status, imprisonment, inability to communicate with the District Court, not having received notice of the District Court's final judgment, and the need to return to his job and family immediately upon release prevented him from filing an appeal in the remaining three (3) days of the appeal period after his release. Petitioner maintains that these conditions constituted excusable neglect or good cause for extending the time for appeal.

The District Court abused its authority and

subsequently denied Petitioner's motion to extend the time for appeal, stating that refusal to obey a lawful state court order and subsequent imprisonment did not constitute excusable neglect or good cause for extending the time for appeal. **The District Court abused its discretion by judging the warrantless searches of Petitioner's properties to be lawful.** The State Court order allowing warrantless searches of Petitioner's properties violated the protections of the Fourth Amendment to the United States Constitution and is presently under appeal to the Pennsylvania Supreme Court.

On October 14, 1999, the date the District Court denied Petitioner's motion to extend the time for appeal, Petitioner was again in county prison for refusing to allow warrantless searches of his papers under discovery proceedings in the same related state equity case. While imprisoned, Petitioner was again unable to communicate with the District Court and did not receive notice of the District Court's denial of his motion for extension. On November 22, 1999, thirty-nine (39) days later, Petitioner was released and subsequently received notice of the District Court's denial of his motion to extend the time for filing an appeal.

On November 30, 1999, eight (8) days after his release from prison for the second time and forty-seven (47) days after the District Court's denial of his motion for extension,

Petitioner filed a second motion to extend the period for filing an appeal. On December 23, 1999, the District Court denied Petitioner's second motion for extension and directed the Clerk of Court to accept no further filings from Petitioner in the matter. On January 14, 2000, within twenty-two (22) days of the District Court's denial of the second motion for extension, Petitioner filed an appeal to the Appellate Court.

Except for the periods of his imprisonment, Petitioner was continuously engaged with the District Court until December 23, 1999 when the District Court directed that no further filings be accepted from Petitioner. The thirty (30) day period for filing an appeal to the Appellate Court should justly be tolled from that date. Throughout the period following the District Court's issue of its final judgment on July 21, 1999, the District Court retained authority to extend the period for filing an appeal. The District Court did not deny Petitioner's second motion for extension for want of jurisdiction. In fact, the District Court's authority to extend the time for filing an appeal continued until December 23, 1999 when it ordered that no further filings be accepted from Petitioner.

Petitioner had the right to file an appeal for a period of thirty (30) days after receipt of notice that the District Court summarily ended any further filings in the District Court. Accordingly, the period for Petitioner's appeal should have

tolled from December 23, 1999. Since Petitioner's appeal was filed on January 14, 2000 within the allowed thirty (30) day period, the Appellate Court erred in dismissing Petitioner's appeal for want of jurisdiction. The Appellate Court erred in denying jurisdiction, by denying Petitioner a thirty (30) day period for appeal.

CONCLUSION

For the reasons set out, Petitioner prays that this petition for writ of certiorari be granted.

Respectfully submitted,

By: Robert H. Barrett

Robert H. Barrett
Appellant, pro se
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Carlisle, PA 17013
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Dated: December 11, 2000

APPENDIX A

UNREPORTED - NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 00-3074

ROBERT H. BARRETT,
Appellant

v.

CARLISLE, Borough of
Appellee

On Appeal From the United States District Court
For the Middle District of Pennsylvania
(D.C. Civ. No. 98-cv-01109)
District Judge: Honorable Yvette Kane

Submitted Under Third Circuit LAR 34.1(a)
September 1, 2000

Before: SCIRICA, RENDELL and FUENTES,
CIRCUIT JUDGES

(Filed: September 11, 2000)

OPINION

PER CURIAM.

For the reasons that follow, we will dismiss this appeal for want of appellate jurisdiction.

The District Court entered its final judgment in this matter on July 21, 1999, granting the defendant's motion to dismiss appellant Barrett's complaint. Barrett's 30-day period to appeal that ruling expired on August 20, 1999. See Fed. R. App. P. 4(a)(1). On September 7, 1999, Barrett timely filed a motion in the District Court pursuant to Fed. R. App. P. 4(a)(5)(A) for an extension of time to appeal. On October 15, 1999, the District Court denied Barrett's motion, finding no "good cause" to excuse his failure to appeal within the 30 days that were allowed.

On November 30, 1999, Barrett filed a second Rule 4(a)(5) motion for an extension of time, reiterating the arguments made in his first motion.[1] Barrett's second Rule 4(a)(5) motion was untimely filed. See Fed. R. App. P.

---

[1] Barrett titled the motion "Plaintiff's Second Motion for Extension of Time for Filing Notice of Appeal." Although the pro se motion arguably could have been treated as a motion for reconsideration of the denial of the Rule 4(a)(5) motion, the motion was filed more than 10 days after the Rule 4(a)(5) motion was denied. Consequently, even had it been construed as a Fed. R. Civ. P. 59(e) motion, it would have been untimely and it would not have served to toll the time to appeal the denial of the Rule 4(a)(5) motion. Thus, we will view the motion strictly as a second Rule 4(a)(5) motion, which is plainly what Barrett intended it to be.

4(a)(5)(A) (explaining that motion must be made "no later than 30 days after" the initial time to appeal expired); see also Amatangelo v. Borough of Denora, 212 F.3d 776, 778 (3d Cir. 2000). On December 23, 1999, the District Court denied the motion on the ground that it still found Barrett's arguments of "good cause" unpersuasive.

On January 14, 2000, Barrett filed this appeal from the December 23, 1999, Order. Barrett contends that the District Court erred in refusing to grant an extension of time to appeal. The appellee contends that the District Court lacked authority to rule on the untimely filed second Rule 4(a)(5) motion, and that this appeal should be dismissed for want of appellate jurisdiction. Appellee's Br. 6-9. The appellee is correct.

Any Rule 4(a)(5) motion to extend the appeal period must be filed within 60 days after the final judgment. See West v. Keve, 721 F.2d 91, 97 (3d Cir. 1983). Barrett's second Rule 4(a)(5) motion was filed on November 30, 1999, which was more than 60 days after the final judgment was entered on July 21, 1999. Because Barrett's motion was untimely filed, the District Court had no authority to rule on it. See I.U.E. AFL-CIO Pension Fund v. Barker & Williamson, 788 F.2d 118, 122 n.1 (3d Cir. 1986).

The time periods prescribed for filing a notice of appeal are "mandatory and jurisdictional." Browder v. Director,

Dep't of Corrections, 434 U.S. 257, 264 (1978). A Court of Appeals cannot enlarge the time to appeal. See Fed. R. App. P. 26(b). Barrett's notice of appeal, which he filed on January 14, 2000, was untimely as to the July 21, 1999, final judgment and the October 15, 1999, Order denying the first Rule 4(a)(5) motion. Consequently, this appeal from the December 23, 1999, Order denying the untimely filed second Rule 4(a)(5) motion will be dismissed for want of appellate jurisdiction. See West, 721 F.2d at 97 (dismissing appeal for want of jurisdiction where Rule 4(a)(5) motion was filed after 60-day deadline expired).

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NO. 00-3074

ROBERT H. BARRETT,

Appellant

v.

CARLISLE, Borough of

Appellee

On Appeal From the United States District Court
For the Middle District of Pennsylvania
(D.C. Civ. No. 98-cv-01109)
District Judge: Honorable Yvette Kane

Submitted Under Third Circuit LAR 34.1(a)
September 1, 2000

Before: SCIRICA, RENDELL and FUENTES,
CIRCUIT JUDGES

JUDGMENT

This case came to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a). On consideration whereof, it is now here ORDERED AND ADJUDGED by this Court that the appeal

is dismissed for want of appellate jurisdiction. Costs taxed against the appellant. All of the above in accordance with the opinion of this Court

ATTEST:

Clerk

DATED: September 11, 2000

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 4:CV-98-1109

ROBERT H. BARRETT,
Plaintiff

v.

BOROUGH OF CARLISLE,
Defendant

Before: KANE, DISTRICT JUDGE and
SMYSER, MAGISTRATE JUDGE

(dated December 23, 1999)

ORDER

On July 21, 1999, this Court adopted the Report and Recommendation of Magistrate Judge Smyser and dismissed this case. On September 7, 1999, after the appeal period expired, Plaintiff filed a Motion to Extend the Time for Filing a Notice of Appeal pursuant to 28 U.S.C. § 2107(c), which provides that "[t]he district court may, upon motion filed not

later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause." On October 14, 1999, the Court issued an Order denying Plaintiff's request for an extension of time, finding that Plaintiff's motion admitted that he became aware of the Court's final appealable order prior to the statutory deadline for filing a notice of appeal, and therefore, he failed to establish good cause for his request for an extension. On November 30, 1999, Plaintiff filed a second motion for an extension of time to file a notice of appeal, with supporting brief. On December 15, 1999, Defendant filed a brief in opposition to Plaintiff's second motion for extension. Plaintiff's second motion will be denied, for the following reasons.

In his second motion and brief, Plaintiff again raises the issue of the effect of his incarceration from July 7, 1999 to August 17, 1999, on his ability to file a timely notice of appeal of the Court's July 21, 1999 Order dismissing this case. Plaintiff again offers no explanation for why he failed to file a notice of appeal (or a request for an extension of time to file a notice of appeal) when he became aware of the Court's final order on August 17, 1999, three days prior to the statutory deadline for filing a notice of appeal. Plaintiff merely argues that

[i]t is unreasonable for the Court to have expected

> Barrett, a pro se litigant, to file a notice of appeal within three (3) days of his release from prison. The extreme conditions of forty-one (41) days imprisonment under lock-down confinement (twenty-three [23] hours per day), no visitors, and lack of any communication with the Court is a clear showing of excusable neglect for extending the time for filing a notice of appeal. Further, Barrett, avers that defending himself against unreasonable discovery requests which violate the search and seizure protections of the Fourth Amendment of the United States Constitution is a good cause which the Court failed to consider.

Plaintiff's Second Motion at 3.

As an initial matter, it is extremely disingenuous for Plaintiff to attempt to use the fact of his pro se status to excuse his failure to file a timely notice of appeal or some communication with the Court prior to September 7, 1999. Plaintiff is not the typical pro se litigant. He has initiated (or removed) a total of eight actions in this Court in the past two years, all stemming from his dispute with the Borough of Carlisle over the condition of numerous properties owned by Plaintiff. Moreover, in his filings, Plaintiff has demonstrated his ability to research legal principles and present his arguments to the Court in compliance with the Federal Rules of Civil Procedure and the Local Rules of this Court.

Further, the Court disagrees with Plaintiff's argument that his imprisonment (which ended three days before the appeal period expired) constitutes "good cause" or "excusable neglect" with regard to Plaintiff's failure to file a timely notice of appeal. First, Plaintiff made no attempt to notify the Court of his changed address while he was incarcerated so that all Court filings would reach him in a timely manner. Moreover, it is significant that Plaintiff's imprisonment was for contempt of court in a Cumberland County lawsuit concerning Plaintiff's properties. Plaintiff's imprisonment for defiance of a lawful court order issued by the Court of Common Pleas of Cumberland County does not constitute "good cause" or "excusable neglect" for his failure to act in this Court. Further, as noted above, Plaintiff's incarceration ended three days before the appeal period expired.

Finally, with regard to Plaintiff's repetitious filing of motions, it is important to note that this Court adopted the report and recommendation of the magistrate judge and dismissed this case on the basis of res judicata, as Plaintiff was attempting to relitigate through this lawsuit issues previously litigated and decided against him in state court. Plaintiff's theory of litigation appears to be that if he keeps asking the Court for the relief he seeks, he will eventually get it. The Court will not reward Plaintiff's abuse of the litigation process.

Accordingly, for all of the reasons discussed above, Plaintiff's Second Motion To Extend The Time For Filing a Notice of Appeal is DENIED. The Clerk of Court is directed to accept no further filings from the Plaintiff in the matter docketed to 4:CV-98-1109.

YVETTE KANE
United States District Judge

Dated: December 23, 1999

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 4:CV-98-1109

ROBERT H. BARRETT,
Plaintiff

v.

BOROUGH OF CARLISLE,
Defendant

Before: KANE, DISTRICT JUDGE and
SMYSER, MAGISTRATE JUDGE

(dated October 14, 1999)

ORDER

On July 21, 1999, this Court adopted the report and recommendation of Magistrate Judge Smyser and dismissed this case. Pursuant to 28 U.S.C. § 2107(a), the time to file a notice of appeal of the Court's July 21, 1999 Order expired on August 20, 1999. On September 7, 1999, Plaintiff filed a motion to extend the time for filing a notice of appeal

pursuant to 28 U.S.C. § 2107(c), which provides: "[t]he district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause." Plaintiff argues that because he was incarcerated until August 17, 1999, he was unable to file a timely notice of appeal. However, as Plaintiff acknowledges in his motion that he became aware of the Court's Order on August 17, 1999, there is no reason why he could not have filed a notice of appeal by August 20, 1999. Accordingly, the Court finds that Plaintiff has failed to establish good cause for his request for extension of time, and therefore, his motion is DENIED.

YVETTE KANE
United States District Judge

Dated: October 14, 1999

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 4:CV-98-1109

ROBERT H. BARRETT,
Plaintiff

v.

BOROUGH OF CARLISLE,
Defendant

Before: KANE, DISTRICT JUDGE and
SMYSER, MAGISTRATE JUDGE

(dated July 21, 1999)

ORDER

Before the Court in the captioned action is the November 5, 1998 report and recommendation of the magistrate judge. Plaintiff filed objections to the report and recommendation, as well as a brief in support of his objections, on November 16, 1998. On November 25, 1998, Defendant filed its brief in support of the magistrate judge's

report and recommendations.

The Court's review of the file and Plaintiff's objections reveals that the objections consist solely of arguments fully considered and rejected by the magistrate judge. Accordingly, upon consideration of the record and the applicable law, IT IS HEREBY ORDERED THAT:

1) The court adopts the report and recommendation of Magistrate Judge Smyser.

2) Defendant's motion to dismiss is GRANTED.

3) The Clerk of Court is directed to close this file.

YVETTE KANE
United States District Judge

Dated: July 21, 1999

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 4:CV-98-1109

ROBERT H. BARRETT,
Plaintiff

v.

BOROUGH OF CARLISLE,
Defendant

Before: KANE, DISTRICT JUDGE and
SMYSER, MAGISTRATE JUDGE

(dated November 16, 1998)

PLAINTIFF'S OBJECTIONS TO REPORT
AND RECOMMENDATION

---

1. Plaintiff Robert H. Barrett files the following Objections to the Report and Recommendation of Magistrate Judge J. Andrew Smyser dated November 5, 1998.

2. The findings and recommendation of the Report that Plaintiff's claims are barred by the principle of *res judicata* and that the case should be dismissed are in error.

a. The principle of *res judicata* cannot deny property owners due process protections of the Fifth Amendment of the United States Constitution (herein, "the Fifth Amendment").

b. Pennsylvania state law cannot deny property owners due process protections of the Fifth Amendment.

c. Pennsylvania state courts cannot deny property owners due process protections of the Fifth Amendment.

d. The Pennsylvania State Historical and Museum Commission (herein, "the State Commission") cannot deny property owners due process protections of the Fifth Amendment.

e. The Borough of Carlisle cannot deny property owners due process protections of the Fifth Amendment.

f. In the event that this Court determines *res judicata* applicable to this case, under Pennsylvania law, *res judicata* precludes a subsequent action when there has been a prior judgment on the merits and there is a concurrence of four conditions: (1) an identity of the thing sued upon; (2) an identity of the cause of action; (3) an identity of the persons and parties to the action; and (4) an identity of the quality or capacity of the parties suing or being sued.

(1). First Condition. The thing sued upon in the previous State case is not the same as the present

Federal case. In the State case, the thing sued upon was the simple denial of the demolition permit by the Borough of Carlisle. In the Federal case, the things sued upon are (a) the denial of judicial review by the State Courts of the State Commission's procedures and alleged certification of the Historic District, (b) the alleged certification of the Historic District by the State Commission, and (c) the denial of the demolition permit by the Borough of Carlisle.

(2) Second Condition. The causes of action in the previous State case are not the same as the present Federal case. The causes of action in the State case were twofold; (a) the State Commission denial of due process protections of the Fifth Amendment and (b) the absence of lawful authority to deny the demolition permit by the Borough of Carlisle. In the Federal case, the causes of action are threefold; (a) the State Courts denial of judicial review under the due process protections of the Fifth Amendment, (b) the State Commission denial of notification, review and comment, historic designation criteria, substantial supporting evidence, etc. under the due process protections of the Fifth Amendment, and (c) the absence of lawful authority to deny the demolition permit by the Borough of Carlisle.

(3). Third Condition. The identity of the parties in the previous State case is not the same as the present Federal case. In the State case, the Defendant was

the Borough of Carlisle, alone. In the Federal case, the Defendants are the Borough of Carlisle and the State Commission. A motion to join the State Commission as a defendant was deemed withdrawn on November 5, 1998 for failure to file a supporting brief. This procedural error has been corrected by refiling a Motion to Join the State Commission as a defendant in the present case along with a supporting brief.

(4). Fourth Condition. The quality or capacity of the parties suing or being sued in the previous State case is not the same as the present Federal case. In the State case, the Plaintiff filed a local agency law appeal as the owner of a single building within the Historic District. In the Federal case, Plaintiff is a member of the class of all property owners within the Historic District and the owner of eight additional properties within the Historic District. As such, Plaintiff's capacity in the Federal case is greater than his capacity in the State case.

3. Based on the foregoing, Plaintiff asks the Court to deny Defendant's Motion to Dismiss Complaint Pursuant to F.R.C.P. 12(b)(6) (complaint barred under the principles of *res judicata*).

Respectfully submitted,

ROBERT H. BARRETT
Plaintiff, *pro se*

Dated: November 16, 1998

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 4:CV-98-1109

ROBERT H. BARRETT,
Plaintiff

v.

BOROUGH OF CARLISLE,
Defendant

Before: KANE, DISTRICT JUDGE and
SMYSER, MAGISTRATE JUDGE

(dated November 5, 1998)

REPORT AND RECOMMENDATION

The plaintiff, Robert H. Barrett, commenced this 42 U.S.C. §1983 action by filing a complaint on July 9, 1998. The plaintiff is proceeding *pro* se.

The defendant is the Borough of Carlisle. The plaintiff alleges the following facts in his complaint. The plaintiff is the owner of three parcels of real estate located at 134, 136

and 138 East High Street in the Borough of Carlisle. (Complaint at ¶3a). The parcels of real estate are within the Carlisle Historic Preservation District. Id. at ¶3b. The Pennsylvania Historical and Museum Commission certified the Carlisle Historic District on October 1, 1975. Id. at ¶3c.

By an application dated February 12, 1996, the plaintiff applied to the Borough of Carlisle for a permit to demolish the buildings at 134, 136 and 138 East High Street and to fill the cellars. Id. at ¶3d. A hearing on the permit application was conducted before the Carlisle Historical Architectural Review Board on March 18, 1996. Id. at ¶3e. A hearing on the permit application was conducted before the Carlisle Borough Council on April 8, 1996. Id. at ¶3f. By a letter dated April 15, 1996, the plaintiff was advised by the Borough that it had denied the permit to demolish the buildings. Id. at ¶3g.

On May 3, 1996, the plaintiff filed an appeal with the Cumberland County Court of Common Pleas challenging the denial of the demolition permit, petitioning the court for a hearing *de novo*, and petitioning the court for an Order that the Pennsylvania Historical and Museum Commission produce its 1975 records leading to certification of the Carlisle Historic District. Id. at ¶3h. On May 5, 1997, the court denied the plaintiff's petitions and dismissed the appeal. Id.

On June 2, 1997, the plaintiff filed a notice of appeal with the Commonwealth Court of Pennsylvania. Id. at ¶3i. On January 29, 1998, the Commonwealth Court affirmed the Order of the Court of Common Pleas which denied the plaintiff's petitions and dismissed his appeal. Id.

On March 2, 1998, the plaintiff filed a petition for allowance of appeal with the Pennsylvania Supreme Court. Id. at ¶3j. On June 9, 1998, the Pennsylvania Supreme Court denied the petition for allowance of appeal.

The plaintiff claims that the certification of the Carlisle Historic District by the State Commission was procedurally flawed and lacked substantial supporting evidence and thus constituted a taking without due process and just compensation. Id. at ¶3k(2). Specifically, the plaintiff claims that the State Commission: 1) failed to notify property owners of the certification process; 2) failed to provide property owners with a period for review and comment; 3) lacked a valid criteria for the certification process; 4) lacked substantial evidence for certification of the Carlisle Historic District; and 5) failed to provide just compensation to property owners for the regulatory taking of their property rights. Id. The plaintiff claims that the Borough lacks authority to regulate property within the Carlisle Historic District due to the flawed certification of the Historic District by the Pennsylvania State Historical and

Museum Commission and that denial of his demolition permit constituted an unlawful taking. Id. at ¶3k(1).

The plaintiff is seeking an order vacating the certification of the Carlisle Historic District, an order directing the Borough of Carlisle to issue to plaintiff a demolition permit, an order directing the Borough to pay just compensation to the plaintiff, and such further relief as may be appropriate. Id. at ¶4.

On August 3, 1998, the defendant filed a motion to dismiss the complaint. On August 12, 1998, the plaintiff filed a response to the motion to dismiss. Also on August 12, 1998, the defendant filed a brief in support of its motion to dismiss. On September 30, 1998, the plaintiff filed a brief in opposition, and on October 16, 1998, the defendant filed a reply brief.

The defendant contends that the complaint should be dismissed pursuant to Fed.R.Civ.P. 12(b)(1). The defendant argues that the court lacks subject matter jurisdiction because the complaint does not contain a short and plain statement of the court's jurisdiction as required by Fed.R.Civ.P. 8.

Although the complaint does not contain a short and plain statement of the court's jurisdiction as required by Fed.R.Civ.P. 8, the plaintiff alleges in his complaint that his claims are based on the Fifth and Fourteenth Amendments to the United States Constitution. This is a 42 U.S.C. §1983

case and the court has subject matter jurisdiction pursuant to 28 U.S.C. §1331.

Pro se civil rights complaints are to be construed liberally. Haines v. Kerner, 404 U.S. 519 (1972). The complaint should not be dismissed for the plaintiff's failure to include a short and plain statement of the court's jurisdiction in the complaint.[2]

The defendant contends that the complaint should be dismissed pursuant to Fed.R.Civ.P. 12(b)(6).

A motion to dismiss pursuant to Rule 12(b)(6) challenges the legal sufficiency of the plaintiff's complaint; the court must decide whether, even if the plaintiff were able to prove all of his allegations, he would be unable to prevail. Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977). In a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, the burden is on the moving party to show that there is no claim. Johnsrud v. Carter, 620 F.2d 29, 33 (3d Cir. 1980). When evaluating a motion to dismiss, the court must accept all

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[2] In his response to the motion to dismiss the plaintiff indicates that the court has jurisdiction pursuant to 28 U.S.C. §1331. Also, on September 30, 1998, the plaintiff filed a motion for leave to amend his complaint to include a statement of the court's jurisdiction. By a separate order filed this date that motion has been deemed withdrawn pursuant to Local Rule 7.5.

material allegations of the complaint as true and draw all inferences in the light most favorable to the plaintiff. Pennsylvania House, Inc. v. Barrett, 760 F. Supp. 439, 449 (M.D. Pa. 1991). However, "conclusory allegations of law, unsupported conclusions and unwarranted inferences need not be accepted as true." Id. at 449-50. A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 44-46 (1957); Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

The defendant contends that the plaintiff's claims are barred by *res judicata*.

Res judicata can be raised by way of a motion to dismiss. Williams v. Murdoch, 330 F.2d 745, 749 (3d Cir. 1964).

28 U.S.C. §1738 requires federal courts to give preclusive effect to state court judgments whenever the courts of that state would do so. Res Judicata applies in 42 U.S.C. §1983 actions. See Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 84 (1984). The preclusive effect in federal court of a state court judgment is determined by state law. Id. at 81.

Under Pennsylvania law, res judicata precludes a subsequent action when there has been a prior judgment on

the merits and there is a concurrence of four conditions: (1) an identity of the thing sued upon; (2) an identity of the cause of action; (3) an identity of the persons and parties to the action; and (4) an identity of the quality or capacity of the parties suing or being sued. McCarter v. Mitcham, 883 F.2d 196, 199 (3d Cir. 1989); Cole v. Finsel, 691 F.Supp. 841, 845 (M.D. Pa. 1988).

The defendant submitted the order and opinion of the Court of Common Pleas of Cumberland County, the order and opinion of the Commonwealth Court of Pennsylvania, and the Pennsylvania Supreme Court's Order denying allowance of appeal regarding the plaintiff's appeal of the denial of the demolition permit. A district court may take judicial notice of matters of public record without converting a 12(b)(6) motion into a motion for summary judgment. Hensen v. CSC Credit Services, 29 F.3d 280, 284 (7th Cir. 1994) (court documents filed in earlier state case properly considered when deciding motion to dismiss). The state court orders and opinions are matters of public record and will be considered in connection with the motion to dismiss.

A review of the opinions of the Court of Common Pleas and the Commonwealth Court of Pennsylvania reveals that the plaintiff presented the same claims to those courts as he is asserting in this case and that the state courts decided those claims adversely to the plaintiff. In the instant case the

plaintiff has sued the same party in the same capacity and has presented the same subject matter and causes of action that were presented to the state courts. The plaintiff's claims are barred by *res judicata*.

Given that the plaintiff's claims are barred by *res judicata*, we do not consider the defendant's other arguments for why the complaint should be dismissed.

Based on the foregoing, it is recommended that the motion to dismiss (doc. 4) filed by the defendant be granted and that the case file be closed.

J. Andrew Smyser
Magistrate Judge

Dated: November 5, 1998

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-98-1109

ROBERT H. BARRETT,
Plaintiff

v.

BOROUGH OF CARLISLE,
Defendant

(filed July 09, 1998)

COMPLAINT

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1. The Plaintiff, Robert H. Barrett, a citizen of the County of Cumberland, Commonwealth of Pennsylvania, residing at 134 East High Street, Carlisle wishes to file a complaint under the Fifth and Fourteenth Amendments of the United States Constitution.

2. The Defendant is the Borough of Carlisle, a subdivision of the Commonwealth of Pennsylvania.

3. STATEMENT OF CLAIM:

a. Plaintiff is the owner of real estate situate in the Borough of Carlisle, Cumberland County, Pennsylvania, being parcels of real estate designated 134, 136, and 138 East High Street.

b. The parcels of real estate in question are situate in what is known as the Carlisle Historic Preservation District.

c. The Pennsylvania Historical and Museum Commission certified the Carlisle Historic District on October 1, 1975.

d. By application dated February 12, 1996, Plaintiff applied to the Borough of Carlisle for a permit to demolish the buildings at 134, 136, and 138 East High Street and fill the cellars.

e. A public hearing on the permit application was conducted before the Carlisle Historical Architectural Review Board on March 18, 1996.

f. A public hearing on the permit application was conducted before the Carlisle Borough Council on April 8, 1996.

g. By correspondence dated April 15, 1996, Plaintiff was advised by the Borough of Carlisle that it had disapproved a Certificate of Appropriateness for him to demolish the buildings at 134, 136, and 138 East High Street.

h. On May 3, 1996, Plaintiff filed an appeal with

the Common Pleas Court, Cumberland County, Commonwealth of Pennsylvania (1) challenging the denial of the demolition permit, (2) petitioning the Court for a hearing *de novo*, and (3) petitioning the Court for an Order against the Pennsylvania Historical and Museum Commission to produce its 1975 records leading to certification of the Carlisle Historic District. On May 5, 1997, the Court issued an Order denying the Plaintiff's petitions and dismissing the appeal.

i. On June 2, 1997, Plaintiff filed a notice of appeal with the Commonwealth Court of Pennsylvania. On January 29, 1998, the Commonwealth Court affirmed the Order of the Common Pleas Court which denied the Plaintiff's petitions and dismissed his appeal.

j. On March 2, 1998, Plaintiff filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania, Middle District. On June 9, 1998, the Supreme Court denied the petition for allowance of appeal.

k. Plaintiff believes and, therefore, avers that Borough Council's denial of his application for a demolition permit constituted an unlawful "taking" for the following reasons:

(1) The Borough of Carlisle lacks authority to regulate property within the Carlisle Historic District due to the fatally flawed certification of the Historic District by the

Pennsylvania State Historical and Museum Commission.

(2) The certification of the Carlisle Historic District by the State Commission was procedurally flawed and lacked substantial supporting evidence. Thus, it constituted a taking (1) without due process of law and (2) without just compensation, in violation of the Fifth and Fourteenth Amendments of the United States Constitution. Specifically, the State Commission:

(a) failed to notify property owners of the certification process;

(b) failed to provide property owners with a period for review and comment;

(c) lacked valid criteria for the certification process;

(d) lacked substantial evidence for certification of the Carlisle Historic District;

(e) failed to provide just compensation to property owners for the regulatory taking of their property rights.

(3) Absent lawful authority to regulate the Carlisle Historic District, Borough Council's denial of Plaintiff's application for a demolition permit constituted a further taking in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

4. WHEREFORE, Plaintiff prays that your Honorable Court:

a. Enter an Order vacating the certification of the Carlisle Historic District by the Pennsylvania State Historical and Museum Commission;

b. Enter an Order vacating Carlisle Borough Council's denial of Plaintiff's permit application, and further, order and direct the Borough of Carlisle to issue Plaintiff a demolition permit for structures at 134, 136, and 138 East High Street, Carlisle, Cumberland County, Pennsylvania.

c. Enter an Order directing the Borough of Carlisle to pay Plaintiff just compensation for all takings of Plaintiff's property rights resulting from the unlawful regulation of the Carlisle Historic District between October 1, 1975 and the present; and

d. Grant such further relief as may be appropriate.

Respectfully submitted,

ROBERT H. BARRETT
Plaintiff, *pro se*

Dated: July 09, 1998

APPENDIX H

IN THE COURT OF COMMON PLEAS OF
CUMBERLAND COUNTY, PENNSYLVANIA

NO. 96-2446 1109 CIVIL TERM

ROBERT H. BARRETT,
Appellant

v.

BOROUGH OF CARLISLE,
Appellee

(dated May 5, 1997)

LOCAL AGENCY APPEAL
OPINION AND ORDER OF COURT

BAYLEY, J., May 5, 1997:--

On February 12, 1996, Robert H. Barrett, applied to the Borough of Carlisle for a permit to demolish three connected houses at 134, 136 and 138 East High Street, Carlisle. A hearing on the application was conducted by the Carlisle Board of Historical Architectural Review. The Architectural Review Board recommended that permission to demolish the

structure be denied and filed written findings of fact and conclusions in support of its recommendation. After the Carlisle Borough Council conducted a hearing on April 8, 1996, council voted to deny a Certificate of Appropriateness to demolish the structures. On April 15, 1996, the Planning/Zoning/Code Manager of the Borough of Carlisle notified Barrett by letter:

> Pursuant to the Historic District provisions of Article XVII of the Carlisle Zoning Ordinance, at its meeting on April 8, 1996, Borough Council disapproved a Certificate of Appropriateness. . . . Accordingly, the application for a building permit for the above-referenced work is subsequently disapproved pursuant to Section 255-133 of the Code of the Borough of Carlisle.[1]

Barrett challenged the action of Borough Council by filing this Local Agency Appeal pursuant to 2 Pa.C.S. Section 752 that provides:

> Any person aggrieved by an adjudication of a local agency who has a direct interest in such adjudication shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals . . .

The Borough of Carlisle filed a motion to quash the appeal. The Borough maintained that Barrett's sole avenue of relief was to appeal the denial of a permit to demolish his houses to the Carlisle Zoning Hearing Board. The motion to

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[1] See 2 Pa.C.S. §§ 553, 554 and 555.

quash was denied by an order supported by a written opinion dated July 29, 1996.[2] Argument on the merits of the appeal and related issues was conducted on April 28, 1997. Barrett requests the following: (1) a de novo hearing before this court, (2) an order directing the Pennsylvania Historical and Museum Commission to produce records, and (3) in the alternative, an order reversing the denial by the Borough of Carlisle of a permit to demolish his houses.

Barrett's houses are located in the Carlisle Historic Preservation District which was created on August 14, 1975, by Carlisle Borough Ordinance No. 1197. On September 22, 1988, the Carlisle Borough Council adopted Zoning Ordinance No. 1600 codified as Chapter 255 of the Code of the Borough of Carlisle. In Article XVII §§ 255-116 through 255-136, the Borough incorporated its historic district preservation ordinance of August 14, 1975, into its zoning ordinance. The historic district preservation sections of the Borough ordinance specifically set forth that the ordinance was enacted pursuant to the authority in Act 167 of 1961, 53 P.S. 8001 et seq. Section 8002 of Act 167 authorizes a borough to create an historical district. Section 8001 of the

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[2] **Barrett v. Borough of Carlisle**, 45 Cumberland L.J. 367 (1996). In **Park Home v. City of Williamsport**, 545 Pa. 94 (1996), decided on July 19, 1996, the Supreme Court of Pennsylvania, **in a local agency appeal**, decided a case where the issue was the propriety of the Williamsport City Council's denial of a permit to demolish an historic structure located within Williamsport's Historic District.

Act defines "governing body" to include a council of any Borough.

Section 8003 of the Act provides that:

> The governing body of the political subdivision is authorized to appoint a Board of Historical Architectural Review . . . . The board shall give counsel to the governing body of the . . . borough . . . regarding the advisability of issuing any certificate which the governing body may issue pursuant to this act.

Section 8004(a) of the Act provides that:

> Any governing body shall have the power and duty to certify to the appropriateness of the . . . demolition or razing of any building, in whole or in part, within the historic district or districts within the political subdivision. Any agency charged by law or by local ordinance with the issuance of permits for the . . . demolition . . . of buildings within the historic district shall issue no permit for any such building changes until a certificate of appropriateness has been received from the governing body.

Section 8004(b) of the Act provides:

> Upon giving approval, the governing body shall issue a certificate of appropriateness authorizing a permit for the . . . demolition or razing of a building, in whole or in part. Disapproval of the governing body shall be in writing, giving reasons therefor, and a copy thereof shall be given to the applicant, to the agency issuing permits and to the Pennsylvania Historical and Museum Commission.

As to Barrett's petition for a de novo hearing before this

court, judicial review of Commonwealth agency action as set forth in 2 Pa.C.S. § 754 provides:

> **(a) Incomplete record.**--In the event a full and complete record of the proceedings before the local agency was not made, the court may hear the appeal de novo, or may remand the proceedings to the agency for the purpose of making a full and complete record or for further disposition in accordance with the order of the court.
>
> **(b) Complete record.**--In the event a full and complete record of the proceedings before the local agency was made, the court shall hear the appeal without a jury on the record certified by the agency. After hearing **the court shall affirm the adjudication unless it shall find that the adjudication is in violation of the constitutional rights of the appellant, or is not in accordance with law, or that the provisions of Subchapter B of Chapter 5 (relating to practice and procedure of local agencies) have been violated in the proceedings before the agency, or that any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence.** If the adjudication is not affirmed, the court may enter any order authorized by 42 Pa.C.S. § 706 (relating to disposition of appeals). (Emphasis added by the Court)

At the hearing before Borough Council on April 8, 1996, the written report of the Historical Architectural Review Board was made part of the record. Borough Council also heard testimony that included a preservation specialist and an architect for the Bureau of Historic Preservation within the Pennsylvania Historical and Museum

Commission. The evidence establishes that Barrett's three houses are Queen Anne style row houses that were probably built in the early part of this century. The houses have a high degree of integrity and constitute a set of houses on a block in the Carlisle Historic District containing a larger group of historic buildings of a high level of integrity. In voting to uphold the recommendation of the Architectural Review Board, Borough Council adopted the findings and conclusions set forth in the written report of the Board which included the following.

1. The work will affect the building, which is located on the south side of the 100 block of East High Street.
2. The applicant seeks to gut and demolish the building at 134-136-138 East High Street.
3. [The] attached Pennsylvania Historic Resource Survey Form for this property [sets forth] the surrounding structures on East High Street and their general exterior characteristics.
4. The proposed work will remove an important historic and architectural contributing resource from the district. In its place will be a vacant lot. The work will destroy the historic and architectural integrity of the street scape of the 100 block of E. High Street.
5. The structure is visible from East High Street and Mulberry Avenue. As noted on the attached Pennsylvania Historic Resource Survey Form, this building maintains a high degree of historic and architectural integrity on both its E. High Street and Mulberry Avenue elevations.
6. [The] attached Pennsylvania Historic Resource Survey Form for the property [sets forth] the general design, arrangement, texture, material and color of the

structure and the relation of such factors to similar features of buildings or structures in the district.
7. [The] Pennsylvania Historic Resource Survey Form for this property unequivocally documents the historic and architectural significance of the building within the context of the Carlisle Historic District. A copy is attached. In addition, the structure is listed as a contributing resource in the original description of the Historic District prepared in 1975, which was certified by the Pennsylvania Historical and Museum Commission on October 1, 1975. The district was listed on the National Register of Historic Places in 1978. Testimony was received from the Pennsylvania Historical and Museum Commission, Bureau for Historic Preservation, concerning this designation and the significance of the subject building. A copy of the letter outlining this position is attached.

Given that the property is historically and architecturally significant, the applicant must prove that demolition is justified under one of the three criteria outlined in Section 255-132(C) of the Zoning Ordinance. These criteria are:

(1) that the applicant proves that the demolition is needed to clear the land for a project of special public benefit that would greatly outweigh the loss of the historic resource;

(2) that the applicant proves that no reasonable beneficial use of the building is possible; or

(3) that the applicant proves that the denial of demolition would greatly result in unreasonable economic hardship to the owner.

The applicant did not prove that any of these three criteria have been met. In fact, the applicant disputes the validity of the historic district regulations and the historic and architectural significance of the subject

building. Therefore, the demolition is not justified and the request should be denied.

[Motion on recommendation]

. . .[T]o recommend that Borough Council not issue a certificate of appropriateness for the proposed work for the following reasons:

1. The building at 134-136-138 East High Street is highly important to the historic character and the continuity of the historic district; and

2. The applicant has not proven that demolition is justified within any of the criteria under Section 255-132 of the Code of the Borough of Carlisle.

Clearly there is a full and complete record of the proceedings before the local agency necessary for us to resolve this appeal without a de novo hearing and without remanding the case to the Board to supplement the record. Notwithstanding, Barrett seeks a de novo hearing to challenge the procedure whereby the Carlisle Borough Council enacted its historic district regulations by ordinance on August 14, 1975. Barrett maintains that the Borough did not (1) gather sufficient and adequate evidence to support the designation of the district; (2) consider the specific structures and properties affected by the district as designated; (3) perform a comprehensive survey of properties within the district; (4) notify individual property owners as to the designation and overlay provisions; and (5) follow the proper procedures set forth in the MPC.

The Carlisle Historic District was created pursuant to

the Act of June 13, 1961, P.L. 282, No. 167, 53 P.S. § 8002, which provides:

> **§ 8002. Creating and defining districts**
>
> For the purpose of protecting those historical areas within our great Commonwealth, which have a distinctive character recalling the rich architectural and historical heritage of Pennsylvania, and making them a source of inspiration to our people by awakening interest in our historic past, and to promote the general welfare, education and culture of the communities in which these distinctive historical areas are located, all counties, cities except cities if the first or second class, **boroughs**, incorporated towns and townships, **are hereby authorized to create and define, by ordinance, a historic district or districts** within the geographic limits of such political subdivisions. **No such ordinance shall take effect until the Pennsylvania Historical and Museum Commission** has been notified, in writing, of the ordinance and **has certified, by resolution, to the historical significance of the district** or districts within the limits **defined in the ordinance**, which resolution shall be transmitted to the executive authority of the political subdivision.

The Carlisle Code sets forth:

> **§ 255-118. Certification**
>
> The existing Historic Carlisle District **has been duly certified under the state law by the Pennsylvania Historical and Museum Commission.** Prior to any changes in the Official Historic Carlisle Map, all required certification shall be received from the Pennsylvania Historical and Museum Commission, under Pennsylvania Act 167 of 1961, as amended. (Emphasis added by the Court.)

On October 10, 1995, the Borough of Carlisle was notified in writing that:

> The Pennsylvania Historical and Museum Commission, at its regular meeting held in Harrisburg on October 1, 1975, adopted the following resolution:
>
> > RESOLVED, that the Pennsylvania Historical and Museum Commission certifies to the historical significance of the area designated by Ordinance No. 1197 of the Carlisle Borough Council of August 14, 1975.

The procedure for challenging a Borough ordinance was set forth in the Act of December 10, 1970, (P.L. 286) which amended Section 1010 of the Pennsylvania Borough Code as follows:

> Appeals from Ordinances.--Complaint as to the legality of any ordinance or resolution may be made by the court of quarter sessions, upon entering into recognizance with sufficient security to prosecute the same with effect and for the payment of costs, by any person aggrieved, within thirty days after the advertisement of any ordinance or the adoption of any resolution.[3]

Barrett cannot now twenty-two years later challenge the procedure whereby the Borough of Carlisle enacted its historic preservation ordinance which created a Carlisle Historic District that was certified by the Pennsylvania Historical and Museum Commission to be of historical

significance. **Franklin Township v. Delmont Borough**, 2 Pa. Commw. 310 (1971); **Health Group Care Centers, Inc. v. City of Pittsburgh**, 122 Pa. Commw. 384 (1988).

Barrett further maintains that the Pennsylvania Historical and Museum Commission failed to properly certify the Carlisle Historic District. Barrett filed a petition seeking an order directed to the Pennsylvania Historical and Museum Commission to produce its 1975 records in order that he may show that the Commission's approval process of the Carlisle Historic District was fatally flawed. In this regard, Barrett argues that his property was "taken" when (1) the Pennsylvania Historical and Museum Commission certified the Carlisle Historic District, (2) the Borough of Carlisle passed its Historic District Ordinance, and (3) the Borough of Carlisle denied his request for a demolition permit.[4] Therefore, although not averring that the Borough of Carlisle did not properly advertise its proposed historic district ordinance as required by law, Barrett maintains that there was a violation of due process of law because all property owners within the proposed Carlisle Historic District were not **individually** notified of (1) the proposed ordinance, and (2)

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[3] A similar thirty-day appeal provision is now set forth in the Judicial Code at 42 Pa.C.S. § 5571(c)(5), and in the Pennsylvania Municipalities Planning Code at 53 P.S. 10909.1(a)(2).

[4] At oral argument, Barrett stated that he is pursuing his claim that there was a "taking" of his property although he does not intend to seek damages for the alleged taking.

the proceedings before the Pennsylvania Historical and Museum Commission to certify the Carlisle Historic District.

The United States Supreme Court in **Penn Central Transportation Co. v. New York City**, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), held that historic designation without the consent of the owner is not a "taking" under the Fifth and Fourteenth Amendments to the United States Constitution. In **United Artists' Theater Circuit, Inc. v. City of Philadelphia**, 535 Pa. 370 (1993), the Supreme Court of Pennsylvania held that the "[d]esignation of a privately owned building as historic without the consent of the owner **is not a taking** under the constitution of this Commonwealth." (Emphasis added by the Court.) The Court, quoting from the zoning decision of **Andress v. Zoning Board of Adjustment of the City of Philadelphia**, 410 Pa. 77 (1963), stated:

> 1) Our State and Federal Constitutions ordain, protect and guarantee **the ownership and use of private property**.
>
> 2) The Constitutionally ordained right to private property . . . and other Constitutionally granted rights are not absolute. These rights and freedoms are subject to the paramount right of the Government to reasonably regulate and restrict, under a reasonable and nondiscriminatory exercise of the police power, the use of property, whenever necessary for the public health, safety, morals and general welfare.

> 30 Neither the Executive nor the Legislature, nor any legislative body, nor any zoning or planning commission, nor any other Governmental body has the right--under the guise of the police power, or under the broad power of general welfare, or under the power of the Commander-in-Chief of the Armed Forces, or under any other expressed or implied power --**to take, possess or confiscate private property for public use or to completely prohibit or substantially destroy the lawful use and enjoyment of property without paying just compensation therefor** . . . .

In **City of Pittsburgh v. Weinberg**, 544 Pa. 286 (1996), the Supreme Court of Pennsylvania stated that "the means [employed by the government in enacting historic district regulations] must not be unduly oppressive upon the property holder, considering the economic impact of the regulation . . ." The Court concluded that its inquiry ". . . [n]eed not proceed beyond the point of our determination that appellees [property owners] did not meet their burden of proving that it was impracticable or impossible to sell their property." In **Park Home v. City of Williamsport**, 545 Pa. 94 (1996), the Supreme Court of Pennsylvania found that the refusal to issue a demolition permit to a property owner in an historic district did not constitute an unlawful taking. The Court concluded that the property owner did not show that it had been deprived of any profitable use of its property because the owners did not demonstrate that it would be impossible to sell their property.

In the case sub judice, Barrett did not produce any evidence of economic hardship as a result of his houses being located within the Carlisle Historic District, or any evidence that the Historic District regulatory scheme prevents the reasonable and beneficial use of the houses. Therefore, there was no "taking" at any time of Barrett's property and he was not denied due process of law.[5]

In summary, we find that Barrett's constitutional rights have not been violated by the enactment of the Carlisle Historic District Ordinance or by the certification by the Pennsylvania Historical and Museum Commission of the historical significance of the Carlisle Historic District designated by that ordinance; that the procedure resulting in the denial of the demolition permit was in accordance with state law and the Carlisle Historic Preservation ordinance; and that the findings of fact in support of Borough Council's denial of a demolition permit are supported by substantial evidence. Accordingly, the following order is entered.

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[5] Barrett also alleges that the Borough's historic district regulatory scheme which tracks the Commonwealth's enabling legislation is constitutionally vague. Appellant's similar argument in **Park Home v. City of Williamsport, supra**, was rejected by the Supreme Court.

ORDER OF COURT

AND NOW, this 5 day of May, 1997, **IT IS ORDERED**:

(1) The petition for a hearing de novo, **IS DENIED**.

(2) The petition for an order directing the Pennsylvania Historical and Museum Commission to produce its 1975 records leading to its certification of the Historic Carlisle District, **IS DENIED**.

(3) The appeal of Robert H. Barrett from the decision of the Carlisle Borough Council denying a permit for the demolition of his houses at 134, 136 and 138 East High Street, Carlisle, **IS DISMISSED**.

By the Court

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Edgar B. Bayley, J.

APPENDIX I

Constitutional and Statutory Provisions Involved in the Case

1. The Fourth Amendment to the United States Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. The Fifth Amendment to the United States Constitution, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use,

without just compensation.

3. The Fourteenth Amendment to the United States Constitution, Section 1,which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. Title 28, United States Code, Section 1254(1) (Courts of appeals; certiorari; certified questions), which provides:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

5. Title 28, United States Code, Section 2107(c) (Time for appeal to court of appeals), which provides:

> The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition,

if the district court finds --

(1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and

(2) that no party would be prejudiced,

the district court may, upon motion filed within 180 days after entry of the judgment or order or within 7 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

6. Title 42, United States Code, Section 1983 (Civil action for deprivation of rights), which provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of

this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

7. Federal Rules of Appellate Procedure, Section 4(a)(6) (Reopening the Time to File an Appeal), which provides:

> The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:
>
> (A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier;
>
> (B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and
>
> (C) the court finds that no party would be prejudiced.